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May 10, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: October 26, 2005

Case Number: TSO-0301

This Decision concerns the eligibility of xxxxxxxxx (hereinafter "the individual") for continued access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's access authorization should be restored. For the reasons detailed below, it is my decision that the individual's access authorization should not be restored.

I. BACKGROUND

On March 15, 2005, the DOE issued a notification letter to the individual. The notification letter indicated that the individual had demonstrated poor judgment on four occasions. The first was a 1996 altercation at a DOE facility with his uncle, a DOE contractor employee. The second was a September 2001 dispute with his girlfriend, after which his girlfriend obtained a protective order. Third during 2002, the individual in jest told a Wal-Mart employee he had a bomb in his shopping bag. The store management barred the individual from the store for one year. The police were called when the individual returned to the store during the restriction period. Finally, during 2002, the individual was involved in a road rage incident that led to a fight and the involvement of the police.

The notification letter also indicated that the individual was evaluated by a DOE consulting psychiatrist on September 24, 2004. The consulting psychiatrist's November 25, 2004 report stated that the individual sustained brain damage during a 1989 traffic accident. DOE Exhibit No. 15. The consulting psychiatrist's report indicates that the four events described above indicate the individual has significant lapses in judgment.

The notification letter concludes that the individual has a mental condition which may cause a significant defect in the individual's judgment or reliability which is a security concern under 10 C.F.R. §710.8(h) (Criterion H).

The notification letter informed the individual that he was entitled to a hearing before a hearing officer in order to respond to the information contained in the notification letter. The individual requested a hearing. I was appointed to serve as the hearing officer. In accordance with 10 C.F.R. § 710.25(e) and (g), I convened a hearing in this matter (the hearing).

At the hearing the individual testified and presented the testimony of his mother. The DOE called the DOE consulting psychiatrist.

II. HEARING

A. The Individual

The individual testified that in 1989 when he was 18 years old he had a serious automobile accident. Transcript of Hearing (Tr.) at 19. After the accident he had to relearn how to do everyday actions including walking and brushing his teeth. Since the accident, he has had problems with his vision, his balance, finding words and with short term memory. Tr. at 14 and 21. The individual is still working on overcoming his remaining problems. For instance, he goes to the gym regularly to work on his balance. Tr. at 14. He is currently living independently and he asserted that he is productive and functional. Tr. at 16. The individual testified that he has been employed at the DOE facility since 1992. Tr. at 13. He has held an access authorization since 1995. Tr. at 13. His job performance ratings have always been good. Tr. at 26.

The individual testified about each of the incidents mentioned in the Notification Letter. He indicated that the 1996 fight with his uncle occurred at work. He testified that the incident was a minor fight after they had been joking with each other. He believe the fight was an isolated incident. He asserted that since 1996, he and his uncle have had a good relationship. Tr. at 16.

He testified that prior to the 2001 domestic violence incident he had lived with his girlfriend for 9 years. Tr. at 17. After a verbal dispute his girlfriend tried to stop him from leaving the apartment. There was some pushing before he was able to leave. His girlfriend was not injured during the incident. After he left the apartment his girlfriend called the police. He testified that the protective order was dismissed soon after it was issued. Tr. at 18.

With respect to the May 2002 road rage incident, the individual testified that another driver would not let him pass and that after several gestures they both stopped their cars and got into an argument. He said there was no arrest, that he sees the other driver occasionally, and that they are on good terms. Tr. at 18-19.

Finally, the individual testified about the 2002 Wal-Mart incident. He was flirting and joking with a female employee and she took seriously his joking remarks about there being a bomb in the shopping bag he was carrying. Tr. at 19. During the next week, he was teased by his coworkers that his picture was up in Wal-Mart and that he was not allowed to return to Wal-Mart. Tr. at 20. He went to Wal-Mart to find out if his picture was on display. The police were called and he was asked to leave the building. Tr. at 20. When he failed to immediately leave the building, the police handcuffed him. He was released in a few minutes and that was the last problem he has had with Wal-Mart. Tr. at 21.

He testified that the inappropriate behavior will not occur in the future because he is now older and smarter. Tr. at 30. He now is able to "let it ride" when people tease him. Tr. at 30. He testified that sometime between 1996 and 2002 he went to the plant psychiatrist because he was getting angry when people teased him. Tr. 32. He testified that the plant psychiatrist helped him to learn to control his anger. Tr. at 32.

The individual testified that while he believes the incidents described in the notification letter are harmless, he recognizes that the DOE is concerned that the incidents will recur. He testified that he did not plan for the incidents to occur and he agrees they indicate poor decision making. Tr. at 33. He testified "I'm just not going to do that stuff anymore. I'm through playing around like that." Tr. at 34.

B. The Individual's mother

The individual's mother testified that in 1989 the individual was in an automobile accident. He was in a coma for two weeks. When he came out of the coma he was unable to stand, to walk or to control his functions. Tr. at 37. She testified that the individual has worked very hard over many years to regain his motor skills and ability to communicate. She is very proud of his success, his current level of functioning, and his ability to live independently. Tr. at 38. The individual's mother testified that the individual currently has short term memory problems, balance problems and a tremor in one of his arms. He continues to work on his problems and she believes that he continues to make progress on managing them. Tr. at 40. She believes that since the accident the individual has had problems deciding on appropriate actions in social situations. However, she believes that he has improved significantly. She summarized her opinion by testifying that previously

he would do something without thinking. That's the way I looked at it. And so I tell him if there is anything that you don't understand, don't do anything until you sit and you think about it. And so now he does. And then he will come and talk to me about it and we will make the decision together which is better or worse. I think he would handle it a lot, lot better.

Tr. at 45.

With respect to the 1996 fight between her son and his uncle (her brother), the individual's mother testified that she has four brothers and they often joke with their nieces and nephews. Tr. at 41. On this occasion, the joking got out of control and her brother started a fight. Her brother has apologized to her and her son for starting the fight. Tr. at 39.

The individual's mother believes that, in the future, the individual will make better choices and will avoid problems by walking away from bad situations. Tr. at 44. Finally, she testified the individual is an honest person and he always says what he thinks. Tr. at 39.

C. The DOE Consulting Psychiatrist

The DOE consulting psychiatrist testified that he was asked to evaluate the individual to determine if he is a “risk for a lapse in judgment or reliability.” Tr. at 46. The consulting psychiatrist evaluated the individual on September 24, 2004. Tr. at 47. During the interview the individual openly discussed the 1989 traffic accident and the four unusual behavior incidents described above.

The DOE consulting psychiatrist administered the Mini Mental Status Exam to the individual. That exam is designed to reveal brain damage or dementia. Tr. at 48. The DOE consulting psychiatrist testified that the individual has suffered brain damage as a result of the 1989 accident. Tr. at 49.

The DOE consulting psychiatrist testified that he was unable to determine whether the brain damage caused the behaviors described above. Tr. at 50. He testified that “. . . [The behaviors] may or may not be, due to the brain damage. Although some of the features are things that we see in brain damage, we also see [the behavior] in people who are not brain damaged.” Tr. at 53. However, the DOE consulting psychiatrist believes that regardless of whether the behaviors described above were caused by brain damage they indicate the individual is a “significant risk in terms of judgment.” Tr. at 50.

III. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer.

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the burden of proof on the individual to bring forth persuasive evidence concerning his eligibility for access authorization. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

This burden is designed to protect national security interests. The hearing is “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.” 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization “would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a).

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard for the granting of access authorizations indicates “that security determinations should err, if they must, on the side of denials”); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues.

In addition to her own testimony, the individual in these cases is generally expected to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 (1995).

B. Basis for the Hearing Officer's Decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. §710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

IV. ANALYSIS

The record in this case indicates that the individual used poor judgment on four occasions and I find that the record supports the DOE consulting psychiatrist's diagnosis that the individual has a mental condition that negatively affects his judgment. Generally speaking, once the DOE learns of a pattern of poor judgment, an individual is as a rule not eligible for an access authorization unless he is able to demonstrate that the poor judgment is unlikely to recur. This usually requires a showing that the individual has maintained good judgment for a period of time, and has developed his skills to use good judgment when faced with difficult or stressful situations. *Personnel Security Hearing (Case No. TSO-0189)*, 29 DOE ¶ 82,820 (2005) (poor judgment as a result of bipolar disorder mitigated by a pattern of "meticulously following his doctor's recommendations"). *Personnel Security Hearing (Case No. TSO-0103)*, 29 DOE ¶ 82,752 (2004) (marijuana use mitigated by corroboration that the behavior was an isolated incident that is unlikely to recur). The testimony about the individual's current behavior was limited to his own testimony and that of his mother. Both testified that the individual is better prepared to make appropriate social decisions. However, because there was no other testimony from family or from friends, co-workers or counselors about the individual's current behavior and maturity, I am not fully satisfied that he has the ability to make good decisions in stressful social situations. *Personnel Security Hearing (Case No. TSO-0026)*, 28 DOE ¶ 82,925 (2003) (in a case involving financial irresponsibility; insufficient corroboration that the individual has achieved financial stability).

In her closing statement the individual's attorney made three arguments supporting the position that the individual's behavior does not pose a current security concern. First, she indicated that the four incidents described above were over an extended period of time. The fight with his uncle occurred in 1996 the others occurred in 2001 and 2002. Tr. at 61.

Second, she indicated that "social judgment perhaps is part of [his problem], but so far as somebody who is going to be a danger to this country, based on these incidents, to me, I don't see that that would form a basis to say he's going to do something that is going to cause a problem at work." Tr. at 61. The

individual has held an access authorization for a number of years and the issues in the proceeding “are related to social adjustment; and that throughout this period of time, regardless of what has happened, he has not had an issue or discipline at work.” Tr. at 9. She clearly believes the 1996 fight with his uncle was a minor incident that was not related to the individual’s job or job performance.

Finally, she indicated “the fact that he has, through his personal drive and effort, gone from a point of having no ability to do anything to be at the point he is now shows something about character that to me implies he is a good security risk.” Tr. at 61. She indicated that “I’m personally very proud of [the individual] for the effort that he has made to become a functioning human being after such a terrible accident, which essentially took away all ability to function.” Tr. at 10.

I am not persuaded that these arguments carry the day in this case. As an initial matter, I reject the assertion that the four incidents were isolated events that do not indicate poor judgment. The individual and his mother both indicated reasons why they believe each of the events was a misunderstanding and not particularly significant. The individual could have brought forward testimony from friends, family and coworkers involved in those events and his day to day life in order to demonstrate that the events are not indicative of his normal behavior. He chose not to present those witnesses. Nor has he presented a contrary opinion from a mental health professional. Without such testimony, I agree with the DOE psychiatrist that the four incidents indicate a pattern of poor judgment and these events are a significant security concern.

I also reject the final two arguments of the individual’s attorney that his poor social judgment when off duty does not give rise to a security concern. My role here is to determine whether the individual is fit to hold an access authorization. Notwithstanding the 1996 fight with his uncle, the central basis for the security concern relates to the individual’s poor social judgment during his off duty hours. There is no question that inappropriate behavior off the job may present a security concern. *Personnel Security Hearing (Case No. VSA-0106)*, 26 DOE ¶ 83,009 (1997). The fact that the individual has not had significant problems on the job and his demonstration of strength of character by virtue of his rehabilitation, while positive factors, are not sufficient to overcome a security concern related to poor social judgment. Those facts do not in and of themselves establish fitness to hold an access authorization.

Accordingly I have determined that the individual has not mitigated the Criterion H security concern.

V. CONCLUSION

I have concluded that the individual has not mitigated the DOE security concerns under Criterion H of 10 C.F.R. § 710.8. In view of the record before me, I am not persuaded that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Thomas L. Wieker
Hearing Officer
Office of Hearings and Appeals

Date: May 10, 2006